No. 90-871

In The

Supreme Court of the United States

October Term, 1990

STATE OF CONNECTICUT AND
GOVERNOR WILLIAM A. O'NEILL,

Petitioners,

v.

MASHANTUCKET PEQUOT TRIBE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 *et seq.*, require a state to negotiate with a resident Indian tribe concerning the rules under which the tribe may operate games of chance on the Reservation, when the state permits such games of chance to be conducted by charitable organizations in the State at "Las Vegas nights"?

2. Does the Indian Gaming Regulatory Act, 25 U.S.C. §2710(d)(3)(A), require a state to negotiate with a resident Indian tribe for a tribal-state gaming compact upon receiving a request for such negotiations from the tribe, without regard to whether the tribe has adopted an ordinance governing such gaming?

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STATUTES INVOLVED

25 U.S.C. §§2710(d)(7)(A), (B)(i), (ii) and (iii) provide:

> (7)(A) The United States district courts shall have jurisdiction over –
>
> > (i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,
> >
> > (ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and
> >
> > (iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).
>
> (B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).
>
> (ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –
>
> > (I) a Tribal-State compact has not been entered into under paragraph (3), and
> >
> > (II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,
>
> the burden of proof shall be upon the State to prove that the State has negotiated with the

> Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.
>
> (iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –
>
> (I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
>
> (II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

I. SUMMARY OF ARGUMENT.

The Petition misstates the central question in this case. The Petition claims that the decision below compels the State to permit the Tribe to engage in commercial casino gambling. In fact, the decision only required the State to negotiate with the Tribe over the rules for casino-style games of chance which are permitted at charitable Las Vegas nights in Connecticut. The decision left open the question of whether existing state rules would apply to these games, or whether different rules would be established during negotiations. The bare obligation to

negotiate a compact presents neither a substantial nor an important issue of law.

The second question presented for review involves a narrow and technical contention that a tribal gaming ordinance must be adopted prior to a tribe's request for negotiations with the state. There is no basis for that contention in the statute, and the issue is not a question of general importance.

II. ARGUMENT.

A. The Question of Whether the Indian Gaming Regulatory Act Requires a State to Negotiate with a Tribe about Games of Chance Does Not Present an Important or Substantial Issue of Federal Law.

1. Petitioner misconstrues the issue presented.

Petitioner says that the central question presented in this case is as follows:

> Do the provisions of 25 U.S.C. §§2701-2721 (Indian Gaming Regulatory Act) compel a sovereign State to permit commercial casino gambling when the criminal laws and public policy of the State prohibit such gambling, except for a limited statutory variation which permits bona fida charitable groups, under rigid State licensure, to raise funds by operating "Las Vegas nights" . . .

Petition at (i). That is not the issue. If it were, there would be no controversy before the Court. Respondent agrees that the Indian Gaming Regulatory Act, 25 U.S.C. §§2701 *et seq.* (the "IGRA"), does not compel a state to permit

any particular form of Indian gaming. All it requires is that the state negotiate in good faith about the rules which will apply to reservation gaming. That is all the Court of Appeals decided:

> This ruling means only that the State must negotiate with the Tribe concerning the conduct of casino-type games of chance at the Reservation. We necessarily leave to those negotiations the determination whether and to what extent the regulatory framework under which such games of chance are currently permitted in the State shall apply on the Reservation.

Decision of the Court of Appeals, Appendix at 20A.

Contrary to Petitioner's assertion, nothing in the decisions below required the State "to stand aside and witness the arrival of casino gaming." Petition at 14. The sole issue posed below was whether the State had an obligation to negotiate about rules under which the Tribe could conduct those games of chance already permitted by the State itself at "Las Vegas nights". The District Court ruled that if a state permits charitable games of chance, the IGRA requires it to negotiate over the terms on which the same games can be conducted on the reservation. The Second Circuit affirmed. Both courts below addressed only the IGRA's requirement for negotiations. Far from declaring that the Tribe was "free to offer unlimited, high stakes casino gambling", Petition at 16, both courts expressly left open the possibility that the Tribe would, in the end, be subject to the State's existing limits on games of chance.

This case only arose because of the peculiar strategy adopted by Connecticut officials in response to the Tribe's

request to negotiate under the IGRA. When Connecticut received that request, it declined to negotiate. Instead, it took the position that it could impose all of its own rules on tribal gaming without negotiating at all. That tactical decision to stay away from the bargaining table narrowed the issues for consideration.

2. The issue presented is not a substantial question of law.

Properly understood, the questions presented in this case are neither substantial nor important. After a four-year legislative debate, and the ruling by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Congress settled the controversy over Indian gaming by passing the IGRA. The Court of Appeals described the requirement for negotiations over a tribal-state gaming compact as the "heart of the ultimate legislative compromise". Appendix at 16A.

The State's refusal to negotiate defied this central mandate of the IGRA. As the Court of Appeals described it:

> Under the State's approach, on the contrary, even where a state does not prohibit class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming. The compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

Appendix at 17A.

Both the District Court and a unanimous Court of Appeals easily concluded that the State had violated the Act by its express refusal to even discuss the rules applicable to games of chance. There is nothing especially significant about this ruling. It simply enforces an unambiguous obligation against a recalcitrant State administration. There is no contrary decision by any other Court of Appeals or state court. A unanimous panel of the Eighth Circuit reached a substantially identical conclusion in *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990). In its amicus brief filed in the Court of Appeals, the United States supported the Tribe's position. Brief for United States as Amicus Curiae in Support of Plaintiff-Appellee. In short, the issue is neither difficult nor important; it does not warrant review by this Court.

3. The ruling below is not a significant precedent.

While Petitioner suggests that this case will have broad impact on other states, no state needs to repeat Connecticut's error in refusing to even begin negotiations. Nothing in this case requires a state to agree to any particular form of tribal gaming in the course of negotiations. If agreement is not reached, the tribe may not proceed with gaming operations. The tribe's only recourse is to seek binding mediation under the IGRA. That recourse is *only* available if a federal court finds that the failure to reach agreement resulted from the state's failure to negotiate in good faith. The significant issues under the IGRA will focus on what constitutes "good faith" bargaining over gaming issues.

In that context, the IGRA expressly permits the court to consider a state's policy concerns in determining whether the state has negotiated in good faith:

> In determining in such an action whether a State has negotiated in good faith, the court –
>
> > (I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities . . .

25 U.S.C. §2710(d)(7)(B)(iii). If a state takes part in serious negotiations, the IGRA clearly does not force it to agree to all of a tribe's demands.

If negotiations between a state and a tribe break down, and the tribe cannot show that the state failed to negotiate in good faith, then the IGRA provides no further relief to the tribe. As the Senate Report makes clear:

> Under this act, Indian tribes will be required to give up any legal right they may now have to engage in class III gaming if: (1) they choose to forgo gaming rather than opt for a compact that may involve State jurisdiction; or (2) they opt for a compact and, for whatever reason, a compact is not successfully negotiated.

S.Rep. No. 100-446, 100th Cong., 2nd Sess., at 36, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 3071, 3084.

Although states may not simply impose all of their existing restrictions on tribal gaming without negotiations, they remain free to negotiate for narrow limits on reservation gaming. If such negotiations are pursued in good faith and fail, nothing further would be required by the decision below. This case did not reach any of the

potentially more substantial questions of how to define "good faith" bargaining by a state under the IGRA.

In this case, Connecticut might have entered negotiations but offered only a limited waiver of its Las Vegas Night rules, insufficient to permit commercial operations. Nothing decided below suggests that this would have been a failure to negotiate in good faith. Once ordered to submit its last best offer to a federal mediator, Connecticut could still have submitted a proposal limiting the Tribe to a non-commercial scale of casino gaming. Nothing in the decision below required the mediator to reject such a proposal.

Instead, for its own reasons, Connecticut submitted a proposed compact which gave the State control over licensing and oversight of any tribal casino, but contained no limits on the size or the stakes or the commercial character of such a casino. The compact selected by the mediator in accordance with the IGRA was the *State's own proposal*. Petition at 10-11. The outcome which the State protests is the result of its own voluntary choices, not anything imposed by the courts below. The decision below should have no impact on other states except to encourage them to engage more seriously in the negotiating process.

4. The Court of Appeals correctly construed the IGRA and the prior decisions of this Court.

The Petition argues that the decision below requires review because it "centers on the application of a rigid rule of statutory construction", because it misapplies this

Court's prior rulings, and because it is inconsistent with the legislative history of the IGRA. Petition at 15-16. These contentions are meritless.

The Court of Appeals fully explored both the language and the history of the IGRA. The Court of Appeals recognized the exceptions to the applicable rules of construction but found that "none advanced by the State has any pertinence here". Appendix at 15A.

The State suggests that the decision below erroneously applied this Court's guidance in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The Court of Appeals' conclusion that Connecticut's laws on games of chance are regulatory in character is wholly consistent with *Cabazon*. Moreover, the particular character of Connecticut's law on Las Vegas nights is not a question of general importance which requires resolution by this Court. This Court ordinarily accepts the Court of Appeals' considered judgment concurring with the District Court on a question heavily dependent on an analysis of the laws of a state within that Circuit. *Runyon v. McCrary*, 427 U.S. 160, 181 (1976).

The State emphasizes Senator McCain's floor statement asking for a "level playing field" for the tribes. Petition at 16. If the State reads this phrase to mean that tribes must conduct gaming under existing state regulations without negotiations, then it would be flatly inconsistent with the IGRA and the rest of its legislative history. Petitioner has snipped a fragment from a long speech in which Senator McCain explained his concern that states might take unfair advantage of the compact requirement:

> If after a period of time the compact approach proves unfair to Indian tribes in their ability to establish and operate class III gaming activities, then the Congress may have to revisit this class III provision.
>
> . . . .
>
> If the States take advantage of this relationship, the so-called compacts, then I would be one of the first to appear before my colleagues and seek to repeal this legislation because we must ensure that the Indians are given a level playing field . . .

134 Cong.Rec. S. 12653 (daily ed., Sept. 15, 1988) (remarks of Sen. McCain).

The sponsors of the IGRA understood that tribes might end up with greater flexibility than state-licensed gaming operators:

> We should be candid about gambling. This issue is not one of crime control, morality or economic fairness. Lotteries and other forms of gambling abound in many States, charities and church organizations nationwide. It would be hypocritical indeed to impose on Indian people more stringent moral standards than those by which the rest of our citizenry chooses to live. *Moreover, Indian tribes may have a competitive advantage because, rightly or wrongly, many states have chosen not to allow the same types of gaming in which tribes are empowered to engage.*

S.Rep. No. 100-446, *supra*, at 36, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS at 3105 (additional views of Sen. Evans) (emphasis supplied).

In particular, the controlling Committee Report makes it clear that Congress meant the limits on tribal

gaming operations to be settled in negotiations between the state and the tribe, rather than automatically imposed by state law:

> licensing issues under clause vi [§2710(d)(3)-(C)(vi)] may include agreements on *days and hours of operation, wage[r] and pot limits, types of wagers, and size and capacity* of the proposed facility.

S.Rep. No. 100-446, *supra*, at 14, 1988 U.S. CODE CONG. & ADMIN. NEWS at 3084 (emphasis supplied).

The decision below correctly construed the IGRA's requirement that a state negotiate over the rules that will apply to reservation versions of the games permitted under state law. There is no reason for this Court to intervene in the dispute. The decision below may help to persuade other States to take the negotiating process seriously, but it leaves the hard and substantive legal issues to future cases.

B. There is No Question of General Importance About the Sequence in Which a Tribal Ordinance Must Be Adopted.

The Petition also asks this Court to review the contention that a Tribe must adopt a tribal gaming ordinance before it may request negotiations under the IGRA. This contention is frivolous. The IGRA expressly requires that a state negotiate in good faith upon receiving a request to negotiate from a resident tribe. 25 U.S.C. §2710(d)(3)(A). As the District Court held, "[t]he obligation to negotiate cannot be more plain or unconditioned". Appendix at 28A. The Court of Appeals similarly found that "the IGRA plainly requires a state to enter into negotiations

with a tribe upon request". Appendix at 11A. Adoption of a tribal gaming ordinance would be pointless until a tribal-state gaming compact defines the limits on tribal gaming. As the District Court observed:

> Adoption of an ordinance as a precondition to any negotiations would encourage the Tribe to adopt an ordinance authorizing all forms of Class III gaming to avoid limiting its bargaining position.

Appendix at 28A.

The narrow question of whether the IGRA imposes a technical requirement for adoption of a tribal ordinance prior to seeking negotiations has neither general importance nor substance. This Court need not address it.

III. CONCLUSION

There is no substantial question of federal law presented in this case, and no issue which has broad importance for the implementation of the Indian Gaming Regulatory Act. The petition for certiorari should be denied.

Dated: December 6, 1990

Respectfully submitted,

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